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November 13, 1991

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NOV 13 1991

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: File No. BPH-910708ME
South Waverly, PA

Dear Ms. Searcy:

Transmitted herewith, on behalf of Shirley A. Penrod, applicant in the above-referenced proceeding are an original and four (4) copies of her Opposition to Petition to Deny.

Should questions arise with respect to this matter, kindly communicate with the undersigned.

Very truly yours,



Robert L. Olender
Counsel for
SHIRLEY A. PENROD

RLO:bpt
Enclosures
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FM EXAMINERS

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Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of

SHIRLEY A. PENROD
South Waverly, Pennsylvania

Application for a New FM
Station on Channel 241A

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File No. BPH-910708ME

To: The Commission

OPPOSITION TO PETITION TO DENY

Shirley A. Penrod ("Penrod"), through counsel, herein opposes the Petition to Deny filed by William F. O'Shaughnessy ("O'Shaughnessy") against her application for a new FM station on Channel 241A at South Waverly, Pennsylvania. In support thereof the following is shown:

PETITION IS PROCEDURALLY DEFECTIVE.

1. Pursuant to 47 C.F.R. Section 73.3584(d) of the Commission's rules, the FCC's staff can return, without consideration, a Petition to Deny which is procedurally defective. O'Shaughnessy's petition warrants this treatment because it is clearly defective. Section 309(d)(1) of the Communications Act provides, in part, that a petition to deny must be either supported by affidavits of persons having personal knowledge of the matters alleged, or, alternatively, refer to facts that the Commission can officially notice. If a prima facie case is made, then on the basis of the response, the Commission must determine whether there is a substantial and material question of fact that warrants

further inquiry. The allegations spewed by O'Shaughnessy's counsel are unsupported by affidavit of any person or persons with personal knowledge and in fact it is not even supported by an affidavit signed by Mr. O'Shaughnessy, himself. For this reason alone, the FCC's staff should return the petition without consideration. See Joseph F. Bryant, DA-91-1325, released October 31, 1991. Furthermore, the petition is in reality a disguised request to enlarge issues which is improperly submitted at this stage in the proceeding. See 47 C.F.R. Section 1.229(b).

O'SHAUGHNESSY'S COUNSEL SHOULD BE CENSORED.

2. The Commission has a long outstanding policy of not countenancing attacks made by counsel against other member of the Bar. The intemperance of the remarks set forth in this pleading by O'Shaughnessy's counsel, Mr. Kraus, should not be allowed. They are unseemly, unprofessional, unwarranted and untrue. Mr. Kraus levels an ad hominem attack on the character, integrity and professional standing of undersigned counsel in claiming that a severe conflict of interest exists from the fact that counsel represents Penrod and Robert Pfuntner.

3. This is a serious accusation and undersigned counsel requests that the Commission censor this type of over-zealous advocacy. There is no conflict of interest in representing an applicant for a station in the same marketplace of an existing client provided that both parties are aware of the representation and have consented, in advance, which was obviously obtained.¹

¹This is true of any client that this firm represents.

4. This kind of conduct by counsel was specifically addressed in Valperaiso Broadcasting Co., 25 RR 530, 531 (1963) in which the Review Board stated that,

"The recognition and standing which members of the bar and engineering profession are accorded in proceeding before the Commission place upon them the responsibility of demonstrating respect for one another and for the Commission's processes. To this end, zeal of advocacy must be kept within bounds. A disregard of the requirements for professional conduct does not serve to advance the cause of the party represented, and it could jeopardize the reputation of the offending person and, in the case of an attorney, his standing to practice before the Commission. See Section 1.24 of the Rules."

5. Also, see Television Broadcasters, Inc., 6 RR 2d 293, 297 (1965) in which the Commission stated that,

"No licensee may lightly place in question the character qualifications of another licensee, and their counsel can be accorded no greater latitude in this area. We expressly disapprove of the course followed by counsel in this case. In the future, we will not countenance such conduct."

This language should be a clear warning to counsel as to his present and future conduct in this proceeding.

REAL PARTY IN INTEREST ALLEGATIONS ARE UNFOUNDED.

6. O'Shaughnessy engages in speculations and surmise in attacking Penrod's application.² It presumes facts that are unfounded and which it is incapable of supporting. O'Shaughnessy's desperation to eliminate the only competitor for this station has motivated him to attempt to discredit Penrod in a shameful and unprofessional manner --- such conduct clearly unworthy of a

²The carelessness of O'Shaughnessy and his counsel is also compounded by the extraneous attacks it levels against individuals who have no connection with the existing applicant or this proceeding.

potential FCC licensee. O'Shaughnessy conjectures that since Robert Pfuntner has not terminated employees who seek to file their own applications, that this presumes that he is a real party-in-interest.

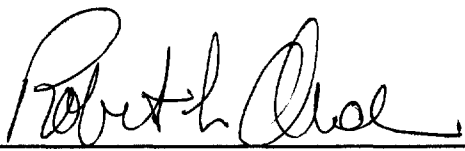
7. Attached is an affidavit from Mr. Pfuntner who explains in great detail how reputable businessmen operate in small markets. He submits that there is no need to be hostile towards his employees' broadcast aspirations, even if they could potentially compete with his own interests. He demonstrates by example as to how he cooperates in the marketplace with his other competitors and exchanges ideas and strategy. Without being too philosophical, if broadcasters all operated in this spirit of cooperation then the FCC and the public interest would be better served. We would not have broadcasters attempting to undercut competitors in the marketplace in order to promote their own personal gains -- a future lesson for O'Shaughnessy.

8. In addition, attached is an affidavit from Shirley Penrod who unequivocally states her independence and lack of present or future association with Mr. Pfuntner in this application. O'Shaughnessy has not provided one shred of evidence backing up his charges, which he claims run rampant in the marketplace. If it were so prevalent, then why doesn't he provide supporting affidavits. The fact is, that the charges are false and the petition should be dismissed.

ACCORDINGLY, for the reasons set forth therein Shirley Penrod requests that the Petition to Deny be forthwith rejected as procedurally deficient or dismissed outright as unfounded and unsubstantiated.

Respectfully submitted,

SHIRLEY A. PENROD

By: 
Robert L. Olender
Her Attorney

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November 13, 1991

25164.06\Pleading.M6

AFFIDAVIT

I, Robert J. Pfuntner, under penalty of perjury do hereby state the following in response to the Petition to Deny filed by William F. O'Shaughnessy against the application of Shirley A. Penrod for a new FM station in South Waverly, Pennsylvania (File No. BPH-910708ME).

I have been attacked in this pleading unjustifiably with condescending language describing my failure to terminate my employees. I have never found that a person's goals and/or dreams are in and of themselves valid grounds for dismissal. I have had many employees throughout my twenty (20) years in the broadcast industry that openly expressed their desire to become a station owner. For example, men such as Robert Smith of Elmira and John Tickner of Newark, stated when they were hired that their ultimate goal was to own a radio station. Knowing that this would probably enhance their performance, I certainly wasn't concerned. I have never felt that when a person files with the Commission for an open frequency, that this was valid grounds for dismissal. First, it would be presumptuous to believe that we know in advance what the Commission's decision will be.

Mr. Raymond Ross, current owner of WEHH Radio Station here in Elmira, once worked at WACK Radio Station in Newark. He has consulted with me on numerous occasions about his business and the operation of his radio station in our community. I have even gone as far as to sell him used equipment for which he still currently

owes my company \$500.00. Both of my stations have loaned their Marti systems to WEHH at numerous times throughout the past ten years. Probably even more interesting, Ray Ross on a number of occasions has stopped into my offices to discuss selling advertising to given clients and even on a couple of occasions, the actual selling of his radio station. I have openly helped Mr. Ross, though he is a competitor.

Mr. John Tickner has openly requested information about three radio stations and/or 80-90's which were in the Rochester/Syracuse Region. When we hired Mr. Tickner on January 1, 1984, it was openly discussed that he wanted to own his own radio station in the future and even entertained the possibility of purchasing part of our Newark station. It is only natural that Mr. Tickner look at local possibilities, in that he owns his own home in Newark and has many business relationships in Wayne County. Again, I see no conflict in hiring a person who wishes to improve his career. When we sought Mr. Tickner out and hired him seven years ago, he freely expressed his desire to own a station.

It is very important to note that WELM/WLVY and WABH/WVIN were in bankruptcy when we purchased them. They have all been turned around and for this reason, among others, I have been consulted frequently about the radio business in our region by future competitors, local media agencies (Kazacko-Horton) and even local banks. I have gladly provided them with the current materials about our Elmira/Corning Market and shared with them my feelings about the local outlook of our business within this region. Often

times, these people have confided in me that they are buying or selling a property within our coverage area, but this has not restricted the information which I have provided.

Within the past few weeks, Mr. Robert Kramarik has conversed with me about purchasing WGMF/WNGZ which is my arch competitor within the Elmira/Corning Market. We have discussed price, terms and other information that a future purchaser should note and consider. Mr. Kramarik has also been discussing the purchase of WGMM, another station in our market. I have provided him with much information including the latest Birch material that we have. There will soon come a day when Mr. Kramarik will own a property within our market and will make a good broadcaster. I do not in any way feel jeopardized.

Mr. William Sitzman, who is the current owner of WPJE, has on a number of occasions stopped at my office to discuss his station and what he needs to do to keep it on the air. It is no secret that this industry has changed greatly within the past few years, and one has to work much harder to keep a good operation going. It should also be noted that William Berry of WHHO/WKPQ has within the past couple of days called to consult with me on financial matters pertinent to his operation of these stations. Mr. Patrick Parish of WENY/WLEZ/WENY-TV was in our offices within the past two months requesting financial information as to financing a radio station of his own within the Elmira/Corning Market. Mr. Sitzman has also served as an FCC consultant engineer for virtually every radio station in this region over the last ten years. None of the

station owners found this activity a conflict of interest.

I guess, being a small town person has led me to try to help those who wish to run a good radio operation. With the stations in our area being relatively small, it is critical to all of us that we provide the listeners with the best that we can produce. We don't feel we have to engender that "Big City" atmosphere with the old "Does Macy's tell Gimball's attitude." Thus, perhaps rather than resenting Mr. O'Shaughnessy's condescending statements, I should be proud that he calls me an "unusually warm and generous employer" and that my "generosity truly knows no bounds."

The point that was discussed about using the same law firm, engineering firm and even the same banks, is only common sense. I believe that I am working with the finest Washington Law Firm, along with the best engineering firm. So why wouldn't I recommend these professionals to anyone who was looking for their services. As for a conflict of interest, I have never found that there was the least trace of a conflict in any dealings that we have had over the twenty years that we have worked with this law firm.

As for local sharing of professional talents, I have a consultant engineer who works part time at all our stations; that being WELM, WLKY, WVIN, WACK and WNNR. But it is interesting to note that this same person has within the past five years and while working at the above listed facilities, also contracted and did work for the following stations which are competitors of our stations:

1. WGMM Big Flats
2. WIQT/WQIX Elmira/Horseheads
3. WLNL Horseheads
4. WEHH Elmira Heights
5. WNGZ/WGMF Watkins Glen/Montour Falls
6. WMKB Ridgebury
7. WATS/WAVR Sayre/Waverly

Mr. Robert Gauss has worked with each of these stations within the past five years, and yet has been our Chief Engineer here in Elmira for the past ten years. I find no conflict in this sharing of talents, though this might not be viewed as acceptable in the "Big City."

Just two and a half years ago, we had an afternoon news person, Mike Settoni, who was the six o'clock news anchor for WETM-TV here in Elmira. The man was exceptionally talented and management at both stations found no conflict in having such a man on competing medias, therefore, we hired Mike as our afternoon news person on WELM.

I could go on at great lengths about other times and places where we have aided fellow broadcasters, but I believe that one can not dispute that we have proven to be "professional partners and aggressive competitors at the same time."

In that Mr. O'Shaughnessy and Mr. Kraus have ascribed to me the intent to commit fraud on a long-standing and grand-scale, it appears they also give me and the FCC absolutely no credit for intelligence. For if it were my desire to "sneak" my actions by the Commission, I surely would have decided not to do all the actions used by Mr. O'Shaughnessy and Mr. Kraus to build their "case" of fraudulent intent. Actions such as using the same law

firm, engineering source, wife of general manager of WVIN and WABH, etc. All of these actions could easily have been handled differently if there was indeed a hidden agenda.

Dated: November 9 , 1991


Robert J. Pfuntner

25164.06\Affidavit.N6

AFFIDAVIT

I, Shirley A. Penrod, applicant for Channel 241A South Waverly, Pennsylvania, under penalty of perjury do hereby state the following:

I have read the Petition to Deny filed by William F. O'Shaughnessy who attacks me as well as my attorney. Mr. O'Shaughnessy brashly accuses me, without substantiation, of being a front for Robert Pfuntner, the President of Pembroke Pines Elmira, Ltd., licensee of Stations WELM/WLVY, Elmira, New York. Mr. Pfuntner is also President of Pembroke Pines Mass Media, N.A. Corp., licensee of Stations WVIN/WABH, Bath, New York, where my husband, Robert L. Penrod, is Station Manager.

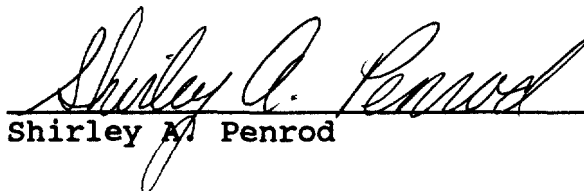
I resent Mr. O'Shaughnessy's accusations and the character assignation that he has leveled against my attorney, Robert Olender. I had given Mr. Olender consent to represent my interests in this application and I was fully aware that Mr. Olender represented Mr. Pfuntner's interests in WELM/WLVY. I am also aware that Mr. Pfuntner gave Mr. Olender permission to represent me since it was from Mr. Pfuntner that I obtained Mr. Olender's name. Thus, there is no conflict of interest in his representing me in my application for South Waverly and Mr. Pfuntner's Elmira stations.

Furthermore, I categorically deny that Mr. Pfuntner has an interest in my application and no discussions have taken place with regard to Mr. Pfuntner subsequently acquiring an interest, should I be successful in getting a grant.

Lastly, although my husband works for Mr. Pfuntner, those stations are not in competition with my proposed station. Since I am uncertain when I will be able to generate an income from my proposed station after I receive a grant, my husband intends to continue to work at his present position in order for us to continue to have a family income. Mr. Pfuntner is pleased with the operation of Stations WABH/WVIN, which my husband has successfully managed, and he has indicated that my application would not jeopardize my husband's job security. This is plain good business sense.

I have been informed by Mr. Pfuntner that he realizes that there will be competition between WLVY and my proposed station, but he apparently prefers to deal with me as a reputable future licensee, as opposed to a competitor with questionable integrity.

Date: November 9, 1991


Shirley A. Penrod

CERTIFICATE OF SERVICE

I, Barbara P. Taylor, a secretary in the law firm of Baraff, Koerner, Olender & Hochberg, P.C., certify that on this 13th day of November, 1991, copies of the foregoing document were sent via first class U.S. mail, postage prepaid to the following:

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